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WM. E. ST. LOUIS

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1926.

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**No. 120**

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LOUISIANA WESTERN RAILROAD COMPANY

*versus*

JOHN B. GARDINER.

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On Certiorari to Court of Appeal for First Circuit,  
State of Louisiana, and on Writ of Error  
to Said Court.

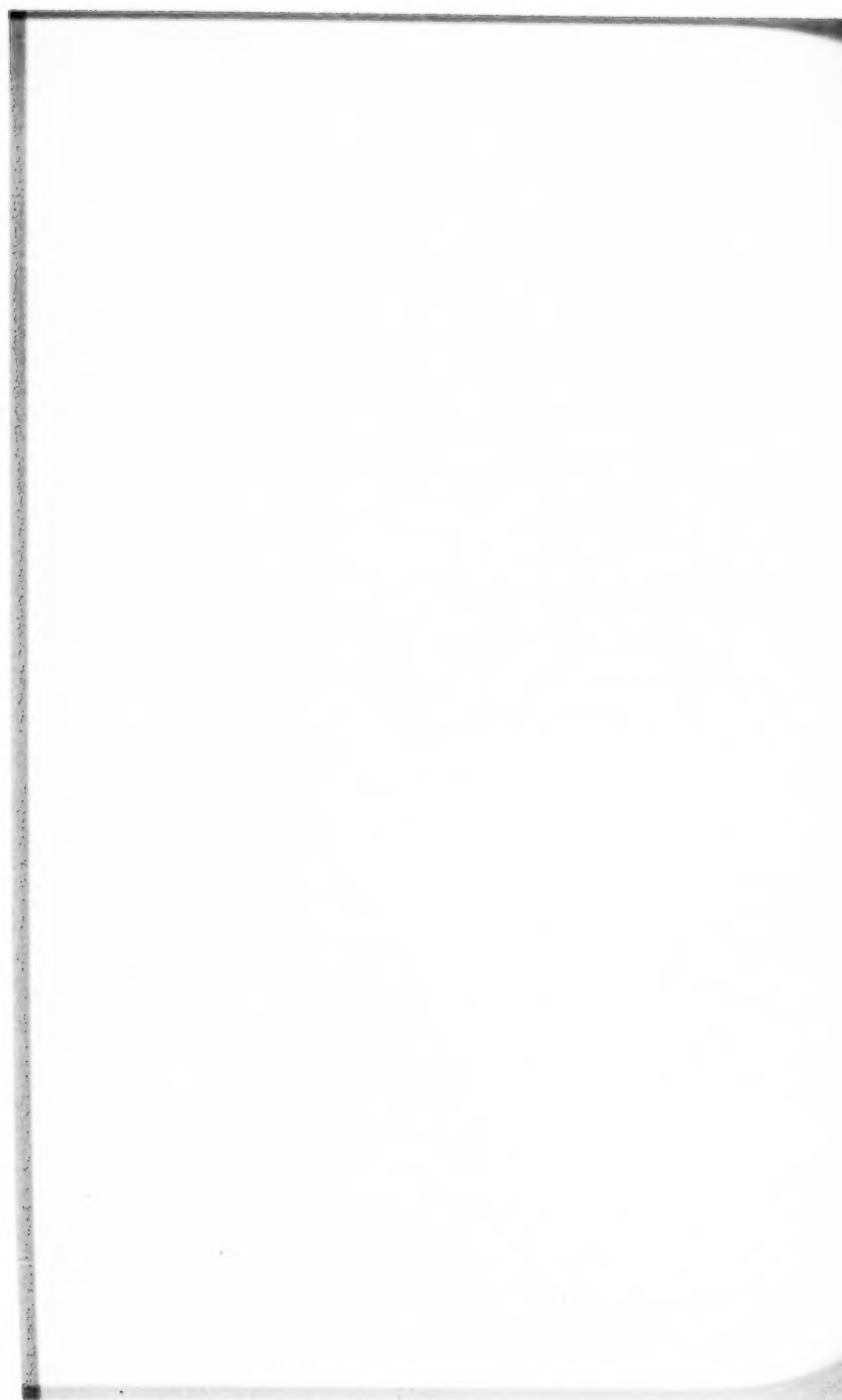
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Supplemental Brief on Behalf of Louisiana Western  
Railroad Company, Petitioner and Plaintiff  
in Error.

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New Orleans, January 7, 1927.



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While we believe that the brief herein filed by us  
in connection with the application for a writ of cer-  
tiorari adequately presents the issues involved in this  
case, we are filing this additional brief for the pur-  
poses of explaining the theory underlying our proceed-

ing both by writ of error and by certiorari, and of discussing one or two decisions rendered after the preparation of our original brief.

(1)

The applicability of the Louisiana statute of limitations is sought by Gardiner to be avoided in two ways: *First*, by reason of the clause in the bills of lading forbidding the institution of suit later than two years from the date of the delivery of the property, and, *secondly*, on the theory that the language of paragraph 11 of Section 20 of the Interstate Commerce Act constitutes a statute of limitations. As it might be claimed that the two opinions of the Louisiana Court do not clearly show on which of these two contentions they are based, it seemed best to use two methods in seeking a review thereof.

Our position as to the right to the writ of error is that giving validity to the bill of lading provision disregards the provision of the Interstate Commerce Act making it unlawful for any common carrier "to provide by rule, contract, regulation, or otherwise, a shorter period \* \* \* for the institution of suits than two years \* \* \* from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice." This is a denial of the title, right, privilege and immunity set up and claimed by the carrier under the Federal statute; and the controversy, therefore, involves the validity of the Federal statute which was denied by the State Court—hence the writ of error is proper under Sec-

tion 237 of the Judicial Code as it read prior to the Act of February 13, 1925.

(2)

The first of the two questions above mentioned was passed on by the Circuit Court of Appeals for the Eighth Circuit in *Chicago & N. W. Ry. Co. v. Bewsher*, 6 Fed. (2nd), 947, decided on July 28, 1925. In that case the carrier pleaded as a defense the identical bill of lading provision herein relied on by Gardiner, and the plaintiff urged its invalidity because providing a shorter limitation than that allowed by the Interstate Commerce Act. The Court's language, at pages 950 and 955, fits the present case like a glove:

"(1) Is the provision in section 3 of the bill of lading that 'suits for loss, damage or delay, shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make the delivery, then within two years and one day after a reasonable time for delivery has elapsed,' void as contravening the amendment of February 28, 1920, to paragraph 11 of section 20 of the Act to Regulate Commerce?

(2) May and should the court read out of the provision quoted the words, 'after delivery of the property,' etc., and read into the contract the provision in said amendment that such period for institution of suits be computed from the date when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof specified in the notice?

(3) Is plaintiff estopped to maintain the suit because he redelivered the claim and supporting papers to Albert Swick with direction to commence suit, and the settlement of the claim by Albert Swick?

(4) Is plaintiff concluded by the fact that the grain was loaded by the shipper and that the bill of lading recited that the weight was 'subject to correction'?

I. We consider these questions in the order stated. It is well settled that, prior to the amendment approved February 28, 1920, it was entirely competent for carriers to limit the time within which suits might be brought on contracts of carriage, subject only to the reasonableness of the limitation. Indeed, we are not without authority on the subject as applied to the particular statute as it existed prior to the amendment. *Leigh Ellis & Co. v. Payne* (D. C.) 274 F. 443, affirmed by the Circuit Court of Appeals for the Fifth Circuit in *Leigh Ellis & Co. v. Davis*, 276 F. 400, and affirmed by the Supreme Court of the United States in *Leigh Ellis & Co. v. Davis*, 260 U. S. 682, 43 S. Ct. 243, 67 L. Ed. 460.

Under this statute, as it existed before the amendment, and other provisions relative to the filing of claims, hardship often occurred by reason of the delay of the carrier in giving notice of its disapproval of the claim, often resulting in an unreasonable

balance of time within which the shipper might institute his suit. This was at least one of the evils which Congress sought to remedy by the amendment of February 28, 1920. By that amendment the words, 'such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice,' were added to the previous paragraph, making the paragraph read as follows:

'Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.' Comp. St. Ann. Supp. 1923 § 8604a.

II. It seems to us clear that, after the amendment quoted, any flat restriction of time within which suit might be brought based upon the time of delivery of the shipment, rather than the time of the giving of the notice prescribed, would be in contravention of the amendment, and 'be unlawful'

within the purview of the amended paragraph.

III. But plaintiff in error, probably anticipating the possibility of the conclusion we here reach, contends that, notwithstanding the inconsistency of the language of the provision of the contract with the amended statute, the court should read out of the contract that part of its express language which initiates the time limit at the date of shipment, and read into the contract the provision of the amendment of 1920. In support of this contention counsel cites *American Railway Express Co. v. Lindenburg*, 260 U. S. 584, 43 S. Ct. 206, 67 L. Ed. 414. We do not think this case in point on the question under consideration. In that case the unlawful provision of the receipt could be readily separated from the remaining provisions, and that case merely holds that the presence of the unlawful provision did not render unlawful others which were separable from it. In the instant case, however, we are asked, not only to read out of the contract a particular expressed provision, but to substitute therefor another entirely different provision, and thereby to declare lawful and enforceable a form of contract which Congress deliberately undertook to and did prohibit. We are constrained to the conclusion that this cannot be done."

The second question above mentioned is fully discussed in our original brief.

We consider it our duty to call to the attention of this Court the decision of the District Court for the Eastern District of Louisiana in *Hartness v. Iberia & Vermilion Railroad Co.*, 297 Fed., 622. That case is an authority against us, and we can only say that, in our humble judgment, that Court proceeded on an erroneous theory which is fully answered by the *Bewsher* case. We may add that the *Hartness* case was cited in the briefs in the *Bewsher* case.

For the reasons stated in our original brief, and hereinabove amplified, we pray that the judgment of the Louisiana Court overruling the State statute of limitations be reversed.

Respectfully submitted,

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